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DEPA by Cominco

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October 18, 1999

Mr. John Key, President  
Cominco Alaska, Incorporated  
Red Dog Mine  
P.O. Box 1230  
Kotzebue, AK 99752

Re: EPA Usurpation of Alaska's Program  
for the Prevention of Significant Deterioration

Dear John:

EPA Region 10 has threatened to overrule the carefully deliberated judgment of the state of Alaska's Department of Environmental Conservation (ADEC) on what constitutes Best Available Control Technology at Cominco Alaska's Red Dog Mine, and to prevent and further delay the issuance of a proposed Prevention of Significant Deterioration (PSD) permit for the necessary and desirable expansion of Cominco's Red Dog Mine. In that Region's most recent letter to ADEC dated September 28, 1999, it substituted its judgment for that of Alaska, stating that Alaska's rejection of a technology known as Selective Catalytic Reduction (SCR) was "clearly erroneous."

The EPA Region stated that Alaska's "elimination of SCR as BACT based on cost-effectiveness grounds is not supported by the record and is clearly erroneous." It went on to say that "in order to justify economic infeasibility, the region believes that the economic impact analysis conducted in the draft permit should have gone beyond a review of cost-effectiveness to include an analysis of whether requiring Cominco to install and operate the more effective control

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strategies would have any adverse economic impacts upon Cominco specifically." The EPA Region has rejected Cominco's plan, accepted by Alaska, to provide emission reduction benefits equivalent to the most effective control technologies through the most cost-effective means.

You have asked whether EPA has legal authority to support its position that Alaska must go beyond cost-effectiveness and determine that in addition to not being cost-effective there must also be an adverse economic impact upon Cominco specifically. The answer to that is a clear. It does not. In fact that position is contrary to EPA's own specific guidance and practice, and to the decisions of the EPA Environmental Appeals Board, as Cominco has pointed out repeatedly.

EPA's own New Source Review (NSR) Manual states that in order to justify elimination of an alternative technology on cost grounds "the applicant should demonstrate to the satisfaction of the permitting agency that costs of pollutant removal (e.g., dollars per total tons removed) for the control alternative are disproportionately high when compared to the cost of control for the pollutant in recent BACT determinations: NSR Manual at B. 45. EPA's Environmental Appeals Board stated the rule concisely and clearly in a 1994 decision:

We accept that cost-effectiveness is determined in most cases by showing that a control option or combination of options is either within or outside the range of costs being borne by similar sources under recent BACT determinations."

*In re Inter-Power of New York, Inc. PSD Appeals Nos. 92-8 and 92-9 (March 6, 1994) at p. 23.*

EPA's NSR Manual states, at page B.31, that,

"In the economic analysis, primary consideration should be given to quantifying the cost of control and not the economic situation of the individual source.

Consequently, applicants generally should not propose elimination of control alternatives on the basis of economic parameters that provide an indication of the affordability of a control alternative relative to the source. BACT is required by law. Its costs are integral to the overall cost of doing business and are not to be considered an afterthought. Consequently, for control alternatives that have been effectively employed in the same source category, the economic impact of such alternatives on the particular source under review should be not nearly as pertinent to the BACT decision making process as the average and, where appropriate, incremental cost effectiveness of the control alternative." (Emphasis added)

Virtually identical language is found in the EPA's Top-Down BACT guidance document, at pages 33-34.

Alaska and Cominco have applied the correct legal standard, demonstrating beyond question that SCR has never been required for similar sources in similar circumstances in Alaska or elsewhere, and that the cost would be disproportionately high for Cominco compared to other sources. EPA Region 10 says this is not enough, and that Cominco must demonstrate specific economic infeasibility at Red Dog. EPA has never required such a showing in any other case, and is ignoring its own guidance in stating that such a showing by Cominco and Alaska is required. This is especially true in the case of a state such as Alaska, that has its own EPA-approved PSD program. It is explicitly stated in EPA's NSR Manual that "the final decision regarding the reasonableness of calculated cost-effectiveness values will be made by the reviewing authority considering previous regulatory decisions." NSR Manual at B.44. Alaska's ADEC is the reviewing agency with that authority to make the final decision. Congress stated in the very first section of the Clean Air Act that "air pollution control at its source is the primary responsibility of States and local governments" 42 U.S.C. 7401(3). EPA Region 10 is cavalierly disregarding this Congressional direction.

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In summary, EPA Region 10 is acting beyond its authority, and contrary to EPA's own guidance and decisions in requiring ADEC and Cominco to demonstrate not only that SCR is not cost-effective and has been rejected for similar sources in similar circumstances, but that Cominco must demonstrate specifically that it is economically infeasible at Red Dog.

If you have any questions with respect to this letter or we can be of any further assistance, please let us know.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert T. Connery". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert T. Connery  
OF HOLLAND & HART LLP

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